BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIJAH CARMEN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 202,586
BEST BUY	)	204,207
Respondent	)	210,069
AND	)	
	)	
SENTRY INSURANCE A MUTUAL COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the Award dated April 8, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on September 12, 1997, in Wichita, Kansas.

APPEARANCES

John C. Nodgaard of Wichita, Kansas, appeared on behalf of the claimant. Kurt W. Ratzlaff of Wichita, Kansas, appeared on behalf of the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Appeals Board has reviewed the transcript of the settlement hearing conducted on November 16, 1995, in Docket No. 202,586.

ISSUES

On November 16, 1995, the parties entered into an agreed award in Docket No. 202,586 which granted claimant permanent partial disability benefits for a 14 percent whole body functional impairment rating for injuries to claimant's neck and back. Pursuant to K.S.A. 44-528 claimant requested review and modification of that award and alleged he was now entitled to receive benefits based upon a work disability. By Award dated April 8, 1997, which is the subject of this appeal, the Administrative Law Judge denied claimant's request to modify the agreed award.

In the April 8, 1997, Award the Administrative Law Judge granted claimant permanent partial disability benefits for an 87.5 percent work disability for injuries to claimant's feet, as alleged in Docket Nos. 204,207 and 210,069.

Respondent and its insurance carrier requested this review. The issues before the Appeals Board on this review are:

(1) Is Docket No. 202,586 before the Appeals Board for review?

(2) If Docket No. 202,586 is subject to review, should the agreed award be modified?

(3) Was the Administrative Law Judge precluded from entering an award in Docket No. 210,069?

(4) Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent to his feet as alleged?

(5) Did claimant provide respondent with timely notice of accident regarding the alleged foot injuries?

(6) Did claimant provide respondent with timely written claim for his alleged foot injuries?

(7) What is the nature and extent of claimant's disability as a result of the alleged foot injuries?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award should be affirmed.

(1) Is Docket No. 202,586 before the Appeals Board for review?

In one document the Administrative Law Judge decided claimant's request for review and modification in Docket No. 202,586 and claimant's request for benefits for bilateral foot injuries presented in Docket Nos. 204,207 and 210,069. By Order dated October 21, 1996, the Administrative Law Judge had previously ordered Docket Nos. 202,586 and 204,207 consolidated for purposes of taking evidence. Docket No. 210,069 is not mentioned in that Order.

When respondent and its insurance carrier filed their request for Appeals Board review, they requested review of only Docket Nos. 204,207 and 210,069. The respondent and its insurance carrier did not request review in Docket No. 202,586 presumably because the Administrative Law Judge denied claimant's request to modify the agreed award previously entered. Claimant did not file a request for Appeals Board review in any of the docketed cases.

As a matter of fairness, the Appeals Board has held that all docketed cases which have been consolidated are subject to Appeals Board review although only one docket number may have been listed in the application for review. The claims have been tried, argued, and decided as consolidated and remain consolidated for purposes of Appeals Board review. To hold otherwise is to lay traps for the unwary.

The Appeals Board finds Docket No. 202,586 is subject to Appeals Board review despite it not being specifically listed in the respondent's and its insurance carrier's Application for Review.

(2) Should the agreed award in Docket No. 202,586 be modified?

In Docket No. 202,586, claimant alleged he injured his neck and back while working for the respondent on August 28, 1994, and each working day thereafter. The parties entered into an agreed award on November 16, 1995, in which claimant agreed to accept permanent partial disability benefits based upon a 14 percent whole body functional impairment rating. Claimant now contends the agreed award should be modified to award him permanent partial disability benefits for a work disability.

The Administrative Law Judge found that claimant failed to prove his back and neck injuries had worsened since the November 16, 1995, settlement hearing and, therefore, denied claimant's request for modification of the agreed award. Claimant argues to the Appeals Board that he is entitled to a modification of the agreed award because it was premised upon claimant returning to work for respondent at an accommodated position at a comparable wage, and that premise is no longer true. Claimant contends the job respondent provided did not comply with claimant's permanent work restrictions and limitations and, therefore, he was forced to leave respondent's employ.

The Appeals Board finds claimant's contention that the agreed award was premised upon claimant returning to work for respondent at an accommodated position at a comparable wage is not supported by the settlement hearing transcript. Therefore, the question becomes whether claimant has shown changed circumstances after the date of the agreed award to warrant modification as permitted by K.S.A. 44-528. The Appeals Board finds claimant has not.

When the parties entered into the agreed award on November 16, 1995, claimant had already left respondent's employment. Therefore, claimant's termination cannot form the basis of changed circumstances to support modification of the agreed award. Further, the Appeals Board agrees with the Administrative Law Judge's determination that the record fails to prove that claimant's neck and back conditions have worsened or that claimant has otherwise suffered increased impairment following the November 16, 1995, agreed award as a result of the neck and back injuries. The Appeals Board finds the Administrative Law Judge's denial of claimant's request to modify the agreed award entered in Docket No. 202,586 should be affirmed.

(3) Was the Administrative Law Judge precluded from entering an award in Docket No. 210,069?

When considering Docket Nos. 204,207 and 210,069, the Administrative Law Judge found claimant had an 87.5 permanent partial disability as a result of bilateral foot injuries. Respondent and its insurance carrier contend Docket No. 210,069 was not before the Administrative Law Judge for decision and, therefore, it was improper for the Judge to consider that claim.

The Appeals Board is somewhat puzzled by the contention of respondent's counsel. At the regular hearing held on December 31, 1996, claimant's counsel announced he was seeking benefits in three docketed cases, including Docket No. 210,069. After that announcement, and without any objection, the Administrative Law Judge took stipulations for the claims made in the three docket numbers now before us. Respondent's counsel did not object at the regular hearing that Docket No. 210,069 was before the Administrative Law Judge for decision.

The Appeals Board's jurisdiction and authority is limited to those issues which were presented to the administrative law judge for determination. *See* K.S.A. 44-555c, as amended. Therefore, because respondent and its insurance carrier did not object to the Administrative Law Judge deciding Docket No. 210,069 despite their knowledge of the Judge's intention to do so, the Appeals Board will not now address it.

Further, the issue whether Docket No. 210,069 was properly before the Administrative Law Judge is rendered moot by the finding made by the Appeals Board

below that claimant sustained simultaneous bilateral foot injuries in the accident alleged in Docket No. 204,207 and, therefore, entitled to an award of permanent partial disability benefits under K.S.A. 44-510e in that proceeding.

(4) Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent to his feet as alleged?

In January 1995 claimant began working for respondent as a cashier on a full-time basis. That job required claimant to stand most of his shift. In spring or early summer of 1995, claimant began to experience symptoms in both feet and ankles. Claimant saw board-certified orthopedic surgeon Steven J. Howell, M.D., on June 20, 1995, with pain and swelling in both feet, the left worse than the right. Dr. Howell began treatment and diagnosed posterior tibial dysfunction. He believed claimant's feet and ankle conditions were due to a combination of overuse from standing and congenitally weak ankle tendons.

The Appeals Board finds claimant stood while working as a cashier for respondent and that the standing simultaneously caused repetitive mini-trauma and an overuse condition in both of claimant's feet and ankles. Therefore, the Appeals Board finds claimant's bilateral foot and ankle injuries arose out of and in the course of his employment with respondent and constitutes one accidental injury which occurred over a period of time.

(5) Did claimant provide respondent with timely notice of accident regarding the bilateral foot injuries?

The Appeals Board finds claimant injured his feet while working for respondent during the period of January 1995 through his last day of work for respondent on November 10, 1995. During that period, claimant advised his supervisors on several occasions of his feet and ankle problems and requested accommodations. Claimant's testimony regarding notice is persuasive.

Although they neither briefed nor argued the notice issue to the Appeals Board, respondent and its insurance carrier would not abandon the issue for purposes of this review. Therefore, the Appeals Board is unaware of the respondent's and its insurance carrier's contentions in this regard.

When considering the entire record, the Appeals Board finds claimant provided respondent with notice of accident and injury to his feet as the injuries were occurring and, therefore, claimant provided timely notice as contemplated and required by K.S.A. 44-520.

(6) Did claimant provide respondent with timely written claim for the bilateral foot injuries?

Similar to the notice issue, respondent and its insurance carrier neither briefed nor argued the written claim issue to the Appeals Board but would not abandon it for purposes of this review. Therefore, the Appeals Board does not have the benefit of their analysis. Nonetheless, the Appeals Board finds claimant served timely written claim upon respondent as required by K.S.A. 44-520a.

As indicated above, claimant's bilateral foot injuries should be considered as occurring over a period of time culminating in injury on his last day of work for respondent on November 10, 1995. Claimant filed his first Application for Hearing, Form E-1, with the Division of Workers Compensation on July 31, 1995, and alleged a left foot injury. Later, on February 7, 1996, claimant filed his second application for hearing with the Division of Workers Compensation alleging a right foot injury.

Claimant has a minimum of 200 days from his last day of work on November 10, 1995, which is also the date of accident for workers compensation purposes, to satisfy the written claim requirements of K.S.A. 44-520a. The Kansas Supreme Court has previously held the filing of an application for hearing with the Division of Workers Compensation satisfies the requirement of written claim. *See* Craig v. Electrolux Corporation, 212 Kan. 75, 510 P.2d 138 (1973) and Magers v. Martin Marietta Corporation, 193 Kan. 137, 392 P. 2d 148 (1964).

The Appeals Board finds both Applications for Hearing were filed within the required 200-day period of November 10, 1995, and, therefore, claimant has established timely written claim.

(7) What is the nature and extent of claimant's disability as a result of the bilateral foot injuries?

Because claimant sustained simultaneous injury to his feet during the period he worked for respondent as a cashier from January 1995 through November 10, 1995, claimant's permanent partial disability benefits are to be computed pursuant to K.S.A. 44-510e which provides as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the

> physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Appeals Board finds the bilateral foot injuries have resulted in permanent work restrictions and limitations as well as a 5 percent whole body functional impairment as indicated by Dr. Howell.

The first prong of the permanent partial disability formula in the above-quoted statute is the loss of ability to perform former work tasks. The Appeals Board agrees with the Administrative Law Judge's analysis that claimant has lost 75 percent of his ability to perform those work tasks which claimant previously performed in substantial and gainful employment during the 15-year period preceding the 1995 accident. That conclusion is based upon Dr. Howell's opinion that claimant is now limited by his bilateral foot injuries to standing and walking a maximum of two hours per day. Based upon Dr. Howell's testimony, the Appeals Board finds that claimant is capable of performing his former job tasks up to two hours per day which, under these facts, establishes a 75 percent task loss.

The second prong of the permanent partial disability formula is the difference between claimant's pre-injury and post-injury average weekly wage. The Appeals Board finds claimant was not able to continue to perform the cashier's position respondent provided claimant because of the bilateral foot injuries and the standing the job required. The Appeals Board also finds claimant has established a 100 percent difference in pre- and post-injury wages. That conclusion is based upon the finding that at the time of regular hearing claimant remained unemployed despite his good-faith effort to seek employment. The record is silent whether respondent and its insurance carrier offered or provided claimant with vocational assistance in an effort to help claimant find new employment.

As required by K.S.A. 44-510e, the Appeals Board averages the 75 percent task loss with the 100 percent wage loss and finds that claimant has an 87.5 percent permanent partial disability. Because the bilateral foot injuries occurred over a period of time ending November 10, 1995, that date should be used for purposes of commencing and computing claimant's award.

Although congenital factors contributed to claimant's bilateral foot injuries there should be no deduction for preexisting impairment because the evidence fails to establish that the congenital condition constituted impairment before the period of accident began. Should claimant find employment, either through his individual efforts or vocational assistance from respondent and its insurance carrier, the parties may request review and modification of the award as permitted by K.S.A. 44-528.

The Appeals Board hereby adopts as its own the findings and conclusions set forth in the Award by the Administrative Law Judge to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated April 8, 1997, entered by Administrative Law Judge John D. Clark, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Wichita, KS
Kurt W. Ratzlaff, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director